

TODD M. MALYNN (SBN 181595)
tmalynn@polsinelli.com
POL SINELLI LLP
2049 Century Park East, Suite 2900
Los Angeles, CA 90067
Telephone: 310.556.1801
Facsimile: 310.556.1802

Attorneys for Defendant
PENGUIN MAGIC, INC.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

YIGAL MESIKA, an individual,

Plaintiff,

vs.

PENGUIN MAGIC, INC., a Nevada
corporation, DOES 1-10, inclusive,,

Defendant.

Case No. 2:15-cv-09314-RGK-DTB

**PENGUIN MAGIC, INC.'S NOTICE
OF MOTION AND MOTION FOR
SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

[Filed concurrently with Defendant's
Memorandum of Points and Authorities;
Separate Statement of Uncontroverted
Facts and Conclusion of Law and
Supporting Evidence; Proposed Order;
and Proposed Judgment]

Judge: Hon. R. Gary Klausner

Date: October 31, 2016

Time: 9:00 a.m.

Place: Courtroom 850
255 E. Temple St.
Los Angeles, CA 90012

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Monday, October 31st, 2016, at 9:00 a.m.,
or as soon thereafter as the matter may be heard in Courtroom 850, located at
Roybal Federal Building and U.S. Courthouse, 255 East Temple Street, Los
Angeles, CA 90012, the Honorable R. Gary Klausner presiding, defendant Penguin
Magic, Inc. ("Penguin Magic") will move this Court pursuant to Rule 56 of the
Federal Rules of Civil Procedure for Summary Judgment or, in the alternative,

Partial Summary Judgment in its favor on Counts One, Two, Three, and Four of the Complaint filed by Plaintiff Yigal Mesika (“Mesika”), on Counterclaims One, Two, Three, and Four of Penguin Magic’s Counterclaims, and on Penguin Magic’s prayer for a finding that this case is exceptional under 15 U.S.C. § 1117 (the “Motion”).

The Motion is made and based on the grounds that there is no material issue of disputed fact, that Penguin Magic is entitled to a judgment as a matter of law on Mesika's Complaint and Penguin Magic's Counterclaim, and on each cause of action, defense and prayer for relief contained therein. Mesika does not own the trademarks in question and therefore does not have standing to bring his trademark claims. The trademarks in question are invalid as generic and as abandoned due to naked licensing. The trademark registrations in question are further invalid due to fraud on the United States Patent and Trademark Office. The alleged infringement also is barred by the first sale and nominative fair use doctrines. Finally, based on the uncontroverted facts, the Court should find this is an exceptional case and award Penguin Magic its reasonably attorneys' fees and costs.

PLEASE TAKE FURTHER NOTICE that this Motion for Summary Judgment or Partial Summary Judgment is based upon this Notice and the concurrently filed (1) Memorandum of Points and Authorities; (2) Statement of Uncontroverted Facts and Conclusions of Law; (3) Declaration of Acar Altinsel; (4) Declaration of Mark Deming and Exhibits; (5) [Proposed] Order granting Motion for Summary judgment; (6) [Proposed] Judgment; and (7) such further arguments and evidence as Penguin Magic may submit with its Reply or as the Court may consider at the hearing of this motion.

This motion is made following a series of conferences of counsel pursuant to L.R. 7-3, beginning on September 13, 2016.

Dated: September 28, 2016 By: /s/ Todd Malynn
POL SINELLI PC

CERTIFICATE OF SERVICE

I certify that on September 28, 2016, the foregoing document was served on Plaintiffs' counsel of record by operation of the Court's CM/ECF system.

By: /s/Todd Malynn
POL SINELLI PC